UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 234

Docket No. SF-0752-07-0403-I-2

Karyn Thomas,

Appellant,

v.

Department of Transportation,

Agency.

October 22, 2008

Alan K. Hahn, Esquire, San Diego, California, for the appellant.

Naomi Tsuda, Esquire, Los Angeles, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency petitions for review of the initial decision, issued November 29, 2007, that reversed the appellant's removal. For the reasons set forth below, the Board GRANTS the agency's petition, REVERSES the initial decision's finding that the agency failed to prove its charge, AFFIRMS the initial decision's findings regarding the appellant's affirmative defenses, and SUSTAINS the agency's action.

BACKGROUND

¶2 On February 13, 2007, the agency removed the appellant from her Air Traffic Control Specialist (ATCS) position in San Diego, California, based upon

the charge of "negligent or careless work performance that results in injury or danger of injury to either the individual involved or others." SF-0752-07-0403-I-1 (I-1) Appeal File, Tab 4, subtab 4b. The agency supported its charge with four specifications. I-1 Appeal File, Tab 4, subtab 4e. Three of the specifications pertained to incidents that occurred in 2004 or early 2005. *Id*. The fourth specification pertained to an incident on September 29, 2005, during which the appellant allegedly failed to observe display data regarding an aircraft's departure from San Diego, failed to ensure that aircraft's separation from adjacent airspace, failed to comply with rules regarding handoff altitudes with the neighboring Pt. Mugu Approach Control, and failed to recognize an adverse situation and take corrective action. *Id*.

¶3 More specifically, the agency alleged that a flight that the appellant was charged with controlling was instructed to climb to 6000 feet, that it instead leveled at 5000 feet without the appellant noticing the error, and that this flight remained on a collision course with another airplane until the appellant noticed and took action to divert the two planes, even though the two aircraft ultimately passed within ½ mile of each other. *Id*. The agency further alleged that the appellant then improperly handed off the flight to Pt. Mugu at 5000 feet instead of the required 6000 feet. *Id*.

¶4 Following a hearing, the administrative judge reversed the appellant's removal, finding as follows: (1) Under the terms of the collective bargaining agreement, the agency's first three specifications were untimely and could only be considered in relation to a penalty determination, and only the fourth specification could be properly considered against the appellant in support of the charged misconduct; (2) the agency failed to prove the fourth specification and, therefore, failed to prove its charge; and (3) the appellant failed to prove her affirmative defenses of gender discrimination, discrimination based upon her status as a parent, retaliation for engaging in equal employment opportunity activity, and harmful procedural error. SF-0752-07-0403-I-2 (I-2) Appeal File,

Tab 17. The administrative judge then ordered the agency to cancel the appellant's removal, to retroactively restore the appellant effective to the date of the removal and to pay the appellant the appropriate amount of back pay and benefits in accordance with Office of Personnel Management regulations. *Id*. at 16. The administrative judge also directed the agency to provide the appellant with interim relief. *Id*. at 17-18.

¶5 In its petition for review, the agency asserts that it proved its charge of negligent or careless work performance that results in injury or a danger of injury to others, and that the administrative judge erred in ordering it to provide the appellant with back pay. Petition for Review File, Tab 3 at 5-17, 26-30. The agency also produced evidence showing that, other than back pay, it provided the appellant with the required interim relief. Petition for Review File, Tab 3.

¶6 In response to the agency's petition, the appellant argues that the agency's refusal to provide the ordered back pay constituted a failure to provide interim relief, and that the Board should, therefore, dismiss the agency's petition for review.[*] Petition for Review File, Tab 4 at 21-28.

ANALYSIS

¶7 We first deny the appellant's motion to dismiss the agency's petition based upon the agency's refusal to provide the ordered back pay. Instead, we find that the agency correctly argues that it is not subject to the Back Pay Act, and that the administrative judge, therefore, erred in ordering it to provide back pay. *See McFarland v. Department of Transportation*, 107 M.S.P.R. 449, ¶¶ 5-7 (2007).

¶8 We next agree with the agency's argument that it met its burden of proving the charge of "negligent or careless work performance that results in injury or danger of injury to either the individual involved or others." In finding that the

[*] The appellant, however, did not challenge the administrative judge's findings that the appellant did not prove her affirmative defenses. Petition for Review File, Tab 4.

appellant was not negligent in the incident described in specification 4, the only specification at issue, the administrative judge noted as a dispositive factor that the "minimum acceptable separation was not lost and the agency did not charge the appellant with an Operational Error reflecting such loss." I-2 Appeal File, Tab 17 at 10. The administrative judge then found that the agency did not establish by preponderant evidence "that this instance of substandard performance 'constituted negligent or careless work performance that results in injury or danger of injury,' as charged." *Id*.

¶9 We find, however, that this analysis erroneously finds an Operational Error to be synonymous with the definition of the offense of "negligent or careless work performance that results in injury or danger of injury to others." *Id*. The agency's charge of "negligent or careless work performance that results in injury or danger of injury to others," however, only required it to prove that the appellant engaged in negligent or careless work and that this negligent or careless work resulted in injury or danger to others. To prove negligence, the agency must show a failure to exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit. *See, e.g.*, *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 26 (2001); *Williams v. Department of Veterans Affairs*, 65 M.S.P.R. 612, 614-16 (1994) (negligence established on showing of duty, the employee's knowledge, and breach of duty of health care worker's responsibility for surgical instrument sterilization), *aff'd*, 69 F.3d 554 (Fed. Cir. 1995) (Table). While the existence of an Operational Error may be probative regarding whether certain conduct constitutes negligence, the administrative judge did not identify any authority for the conclusion that the absence of an Operational Error precludes a finding of negligence, and we discern none. I-2 Appeal File, Tab 17 at 10.

¶10 Instead, we find that the record supports the conclusion that the appellant was negligent, as charged, and that her negligence resulted in danger of injury to

others. Safety Assurance Manager Ronald Beckerdite testified that the appellant's errors included failing to notice that a plane under her control had not complied with her instruction to climb to 6000 feet, and that she had not completely "handed off" that plane to the Pt. Mugu controller before it entered the 1-½ mile buffer zone preceding the boundary of that sector of airspace. Hearing Transcript (Tr.) at 91-94. He added that the appellant's mistakes caused a safety situation that "scares" him because two aircraft were closing in on each other because of the appellant's errors. *Id*. at 95-96. He further testified that there was no excuse for the appellant's failure to notice that the aircraft did not climb as instructed because there were very few aircraft in the area and the circumstances presented a very simple situation. *Id*. at 96. He further stated that, while the pilot of that plane had made a mistake, the appellant was obligated to ensure that the pilot follows her instructions regarding the proper altitude, and that the appellant's actions did not meet the necessary degree of care required under the circumstances. *Id*. at 97.

¶11 Operational Manager Jay Beach, the appellant's second-line supervisor, also testified that he believed that the appellant did not exhibit the necessary degree of care required by an ATCS under the circumstances. *Id*. at 109, 126. He stated that the appellant made an "extremely serious" mistake because, despite light air traffic, the appellant failed to notice that the two aircraft were on a collision course at the same altitude. *Id*. at 123-26. He further testified that the appellant's mistakes constituted negligence and inattention to duty, and turned a very routine task into a very dangerous situation. *Id*. at 130-31.

¶12 The administrative judge also found that Investigator-in-Charge William Smith similarly noted that, while the appellant "resolved" the situation where both planes were at the same altitude, she failed to notice that problem before the Pt. Mugu ATCS brought it to her attention, and then she failed to ensure that the Pt. Mugu ATCS accepted radar contact before the aircraft reached the 1-½ mile buffer zone, and this latter failure constituted an "operational deviation." I-2

Appeal File, Tab 17 at 7. Support Manager for Training Annette Gowns also recounted her opinion that the appellant could have done more to correct the pilot's error in not complying with the appellant's direction to climb to 6000 feet. Tr. at 270.

¶13 We find that this evidence satisfies the agency's burden of proving that the appellant's performance with respect to specification 4 was negligent or careless and that it caused a danger to others. We, therefore, sustain the charge. *See Williams v. Department of the Army*, 102 M.S.P.R. 280, ¶ 6 (2006) (proof of a supporting specification is sufficient to sustain the charge). Further, given the agency's mission of promoting flight safety, we find that the agency has established the requisite nexus between the sustained charge and the efficiency of the service.

¶14 We next address the reasonableness of the penalty. When all of an agency's charges are sustained, but some of the underlying specifications are not sustained, the agency's penalty determination is entitled to deference and is reviewed only to determine whether it is within the parameters of reasonableness. *Williams*, 102 M.S.P.R. 280, ¶ 7. In applying this standard, the Board must take into consideration the failure of the agency to sustain all of its supporting specifications. *Id*. Nevertheless, the Board's function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Id*.

¶15 Here, the record establishes that the deciding official considered the appropriate penalty factors. Tr. at 165-71. Specifically, the deciding official testified that the appellant's misconduct was serious because it jeopardized the safety of the flying public, and that the appellant occupied a position that required safeguarding lives and property. *Id*. at 165-66, 168. The deciding official further testified that the appellant's length of service in her position was

sufficient to put her on notice of the rules that she had violated, that the appellant showed little potential for rehabilitation because she had a prior 10-day suspension for sleeping on the job and prior training had not prevented the sustained misconduct, and that the appellant had lost the trust and confidence of her supervisors. *Id*. at 168-71. We also find that, although the administrative judge properly omitted consideration of the first three specifications under the terms of the collective bargaining agreement and the court's decision in *Brehmer v. Federal Aviation Administration*, 294 F.3d 1344 (Fed. Cir. 2002), it is proper to consider these incidents in assessing the penalty. I-2 Appeal File, Tab 17 at 2-5; *Brehmer*, 294 F.3d at 1349-50. These incidents include instances of operational errors, unsatisfactory performance, and failing to follow operating procedures. I-1 Appeal File, Tab 4, subtab 4e. We, therefore, conclude that the removal penalty is within the bounds of reasonableness for the sustained charge.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.